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**MEMO ENDORSED**

November 5, 2021

Via ECF  
Hon. Kenneth M. Karas  
United States District Judge  
Southern District of New York  
300 Quarropas Street  
White Plains, NY 10601

Re: U.S. v. Leibys Mercedes, 17 CR 419 KMK

Your Honor:

I write to request resolution of two issues.

**First**, by Order dated February 25, 2021 (ECF 240), Your Honor appointed me pursuant to the Criminal Justice Act (CJA) to represent Leibys Mercedes. My understanding of this post-judgment CJA assignment was limited to exploring a potential motion for Compassionate Release ("CR") under 18 U.S.C. §3582(c)(1)(A). I have consulted with Mercedes and reviewed the CR issue and have determined that there is no viable CR motion to be made at this time. If I am correct that the scope of my CJA assignment was limited to the CR issue, then I request that the Court relieve me as counsel as there is no further work to be done on that issue. I make this request without prejudice to Mercedes making a future CR motion should the facts, circumstances and law in the future justify a reduction in sentence.

**Second**, I request that the Court rule on Mercedes request for appointment of counsel (ECF 245, ECF 253) to represent him in a potential *Habeas* motion pursuant to 28 U.S.C. §2255. My understanding is that this potential 2255 motion concerns whether false statements were made by former Yonkers Police Officer Sean Fogarty in the Grand Jury and/or in affidavits by Fogarty submitted in application for warrants to search and seize evidence used against Mercedes at trial. The Government has acknowledged Fogarty's guilty plea to perjury and false statements (ECF 249) but disputes that this post-judgment development entitles Mercedes to appointment of counsel or other relief.

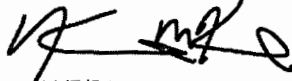
Accordingly, I request a ruling on Mercedes' application for appointment of counsel, and if the request is denied then to notify Mercedes of his right to file a *pro se* §2255 motion. I am concerned that without a prompt decision on these issues and lack of clarity about current CJA counsel's scope of representation, the time for filing a §2255 motion may expire to Mercedes

detriment. This is of particular concern given that the Second Circuit decided (19-1139) Mercedes' appeal in July, while a motion must be timely made in compliance with §2255(f).

Application to appoint Mr. Hochheiser as CJA  
counsel to represent Mr. Mercedes in a  
potential Section 2255 Petition is granted.

Respectfully submitted,

So Ordered.

  
11/5/21



Daniel A. Hochheiser

Cc: all counsel via ECF  
Leibys Mercedes by U.S. Mail